(19)

No. 04-278

IN THE

Supreme Court of the United States

TOWN OF CASTLE ROCK, COLORADO,

Petitioner,

v.

JESSICA GONZALES, individually and as next best friend of her deceased minor children REBECCA GONZALES, KATHERYN GONZALES, AND LESLIE GONZALES,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

PETITIONER'S REPLY BRIEF

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ARGUMENT

I. Respondent Concedes that *DeShaney* Is Not at Issue, But Presses a Substantive Rather Than Procedural Due Process Argument Nonetheless.

Respondent correctly acknowledges that "[t]his Court is *not* being asked" to revisit *DeShaney* v. *Winnebago Cty. Dept. of Soc. Servs.*, 489 U.S. 189 (1989). Resp. Br., at 9 (emphasis added); *see also* Brief of *amici curiae* Nat'l Black Police Ass'n, *et al.* ("NBPA Br."), at 2 ("Respondent does not seek to relitigate *DeShaney*").[1] Nevertheless, Respondent repeatedly appears to challenge the substantive outcome rather than merely the procedures that Castle Rock afforded. As Judge McConnell noted in his dissenting opinion below, that is a *DeShaney* challenge, not one under *Board of Regents of State Colleges* v. *Roth*, 408 U.S. 564 (1972), and it is hard to square with Respondent's concession that this Court is not being asked to overrule *DeShaney*, or with the failure to preserve any such challenge in the court below, *see* Petr's Opening Br., at 9-10 n.4.

At page 25, for example, Respondent claims that Section 18-6-803.5(3) of Colorado's Revised Statutes imposed on Castle Rock a duty "to enforce the restraining order" and that "Castle Rock's failure to perform adequately its statutory duties in this regard constituted a denial of [her] procedural due process." Similarly, at page 31, Respondent contends that "Castle Rock was required . . . to perform the non-discretionary, ministerial task of using 'every reasonable means' to enforce the restraining order, and that its "failure

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[1] Some of Respondent's *amici* apparently seek to re-litigate *DeShaney*. *See* Brief of *amici curiae* ACLU, *et al.* ("ACLU Br."), at 8-9. Their efforts run afoul of the general rule that an amicus cannot expand the questions presented to this Court. *United Parcel Service, Inc.* v. *Mitchell*, 451 U.S. 56, 60 n.2 (1981).

to follow this legislative and court mandate denied Ms. Gonzales and her three daughters their fundamental due process rights." In other words, Respondent is complaining that the police failed to enforce the restraining order—a substantive claim—not that the police failed to give her process before failing to enforce. *See also* NBPA Br., at 4 ("Respondent believes that her pleas for enforcement should have been heeded . . . . But at base she claims that Petitioner ignored her requests for assistance"); Brief of *amici curiae* Nat'l Network to End Domestic Violence, *et al.* ("NNEDV Br."), at 21 (describing the police failure here as a "failure to enforce," not a failure to afford process before failing to enforce); Brief of *amici curiae* Family Violence Prevention Fund, *et al.* ("FVPF Br."), at 5 ("failure to enforce . . . was a violation . . . of procedural due process"). The only "process" that would meet her objection is a different substantive outcome.

Respondent's argument to the contrary, at page 13, fundamentally misconstrues the distinction between procedural and substantive claims drawn in *County of Sacramento* v. *Lewis*, 523 U.S. 833 (1998). This Court noted in *Lewis* that a procedural due process claim is based on "a denial of fundamental procedural fairness," while a substantive claim is based on the "exercise of power without any reasonable justification in the service of a legitimate governmental objective" (or, assuming that police *inaction* can properly be characterized as an "exercise of power," the failure to exercise power without any reasonable justification). *Id.*, at 845-46. While Respondent apparently recognizes that any claim that "Castle Rock's denial of her enforcement rights arose out of unjustified governmental action" would be a substantive claim foreclosed by *DeShaney*, she contends instead "that it was *procedurally unfair* for the Castle Rock police arbitrarily to decline to perform duties required of them . . . ." Resp. Br. at 13 (emphasis added); *see also* NBPA Br., at 19 ("Petitioner merely 'repeatedly ignored and refused her requests

for enforcement'"). Yet in both iterations, the claim is that the police action (or, more correctly, *inaction*) was arbitrary and unjustified—a substantive claim. Simply adding the words "procedurally unfair" to the latter formulation does not alter the substantive nature of the claim.

The scant two pages of Respondent's brief actually devoted to "process" makes this abundantly clear. *See* Resp. Br., at 32-34. Respondent concedes that she made "repeated phone calls to the police department." Resp. Br., at 34. She acknowledged in her complaint that Officers Brink and Ruisi were dispatched to her home in response to her first call at approximately 7:30 p.m. Complaint ¶¶11-12, PA 126a. She alleges that she showed the officers the restraining order and requested, albeit unsuccessfully, that it be enforced. *Id.*, ¶ 12. By her own allegations, she even admits that Officers Brink and Ruisi responded to her request, informing her that "there was nothing they could do about the TRO." *Id.* She contends in her complaint that she again spoke with Officer Brink during a phone call at approximately 8:30 p.m. and asked him to put out an APB for Mr. Gonzales, and she again admits by her own allegations that Officer Brink responded to her request by "refus[ing]" it, telling her instead to wait until 10:00 p.m. *Id.*, ¶ 13. She acknowledges that she spoke again with the Castle Rock police dispatcher at approximately 10:10 p.m. and again at midnight, and then gave an incident report to Officer Ahlfinger at approximately 12:50 a.m. Despite these multiple "hearings" pressing her requests to the police, and despite the multiple police responses, Respondent claims that "in effect no one was listening" because the enforcement action she requested was not taken. Resp. Br., at 34. Again, that is a complaint about the substantive outcome, not about the process, and it is foreclosed by *DeShaney*.[2]

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[2] Even if, despite *DeShaney* and despite Respondent's failure to preserve the *DeShaney* substantive due process claim below, this Court were to

This Court has previously noted that a procedural due process claim pertains only to the process afforded, not to the outcome of that process. *See, e.g., Edwards* v. *Balisok*, 520 U.S. 641, 645 (1997) (citing *Carey* v. *Piphus*, 435 U.S. 247, 266 (1978)). Even erroneous decisions made after an appropriate hearing simply do not offend *procedural* due process. To the extent any *process* was required, *but see infra*, Part II, it was provided. *See, e.g.*, Resp. Br., at 33 (quoting *en banc* decision below, PA 40a) (noting that if, after completing probable cause determination, "an officer finds the restraining order does not qualify for mandatory enforcement, the person claiming the right should be notified of the officer's decision and the reason for it"); NBPA Br., at 21 (same); Brief of *amici curiae* Nat'l Ass'n of Women Lawyers, *et al.* ("NAWL Br."), at 9 ("police need provide *only an informal 'hearing'* to the complainant in order to determine whether probable cause exists that a violation has occurred") (emphasis added).

II. Even if Colorado Mandates Enforcement, It Has Not Thereby Created a *Roth*-Type Property Interest.

For the reasons set forth in Petitioner's Opening Brief, the Colorado statute establishing procedures for enforcing violations of restraining orders does not mandate a particular result, even if those procedures are summarized on the restraining order itself. Thus, the statute (even when combined with the restraining order) does not create a *Roth*-type property interest. But even if a particular result—arrest—is deemed to be mandated, this Court confirmed in *Sandin* v. *Conner*, 515 U.S. 472 (1995), that a State may establish mandatory procedures without creating a property right to those procedures. Respondent does not even mention, much less explain away, this Court's holding in *Sandin*. Additionally (as noted by the Department of Justice in its *amicus curiae* brief), this Court has recognized that private citizens do not have a property interest in the arrest of another, yet Respondent is silent on that point, too. Finally, even if this Court were to reverse course and recognize that a State might create a property-right entitlement to the arrest of another, Colorado has clearly not done so here. The underlying crime of violation of a restraining order is only a class 2 misdemeanor, and Colorado law immunizes police from tort liability for any but willful and wanton conduct—hardly the stuff of a *Roth*-type property interest. Upholding the prospect of constitutional liability found by the Tenth Circuit below would therefore fundamentally alter rather than affirm the considered policy judgment of the State.[3]

consider whether Castle Rock's failure to enforce the restraining order so "shocked the conscience" as to violate substantive due process, this Court in *Lewis* rejected, in the context of police *action*, mere deliberate indifference as sufficient for constitutional liability outside the custodial prison context. 523 U.S., at 852. A "purpose to cause harm," or action taken "maliciously and sadistically for the very purpose of causing harm," is required. *Id.*, at 853-54. The standard should be at least as high for police *inaction*. None of the allegations in the complaint come close to the malicious purpose standard required by *Lewis*.

[3] Respondent seeks to minimize the implications of her position by claiming that it would only apply to statutory entitlements coupled with individual restraining orders. Every case cited by Respondent for the proposition that the state can create non-traditional property interests in services was in the context of a state statute standing alone, and had nothing to do with individualized court orders. See Resp. Br., at 14. In this case, the restraining order adds nothing to the supposed "creation" of a property right, but rather is merely the factual trigger that makes the *statute* applicable, no different, *e.g.*, than a report of child abuse that triggers statutory protection procedures. Despite Respondent's protests to the contrary, her theory would spawn a plethora of "property" rights and constitutional claims from even the most ordinary state statutes that seek to provide law enforcement or social services guidance, causing federal court intrusion into vast swaths of traditional state activities.

A. Without a Fixed Mandate for a "Specific Benefit," There Is No Property Interest.

Respondent remains unclear as to just what it is that the statute (together with the restraining order) at issue here mandates. At times, she seems to argue that she has a property right in a particular means of enforcement—the police must arrest or seek a warrant for an arrest if arrest is impractical under the circumstances. Resp. Br., at 19, 23.[4] She subsequently concedes, though, that "there may be instances where the mandatory duty of enforcing a restraining order could be accomplished through means other than arrest," and she even concedes that no enforcement would be required for a "technical violation" of the restraining order, such as "when the restrained individual is found standing 99 yards away from the family home when the restraining order requires him to remain at least 100 yards away." Resp. Br., at 26, 28; *see also* NBPA Br., at 8 ("'Enforcement,' as used in the Colorado statute, *may* include arrest, and often must. But it may alternatively or additionally include obtaining a warrant or securing children") (emphasis added).[5]

Moreover, the alternative arrest/warrant-for-arrest options are conditioned on a finding of probable cause, a concept that this Court has studiously declined to define with any precision. *See, e.g.*, *Maryland v. Pringle*, 540 U.S. 366,

[4] Even the distinction between arrest and seeking a warrant for arrest undercuts the claim of specific benefit. As former Colorado Representative Peggy Kerns, sponsor of the 1994 statutory amendments at issue here and one of Respondent's *amici*, noted, arrest was not mandated when impractical, such as "when the person who violated the order is not to be found at the scene"—the very circumstances presented here. Brief of *amici curiae* Peggy Kerns, *et al.* ("Kerns Br."), at 9.

[5] Some of Respondent's *amici* disagree on this point. *See* NNEDV Br., at 29 (contending that arrest is even mandated if the restrained party steps even a foot inside a 100-foot distance ban); Brief of *amici curiae* Nat'l Coalition Against Domestic Violence, *et al.* ("NCADV Br."), at 3-4 ("statute . . . required the responding officers to arrest Mr. Gonzales").

371 (2003) ("The probable-cause standard is incapable of precise definition or quantification into percentages because it deals with probabilities and depends on the totality of the circumstances"); *Ornelas* v. *United States*, 517 U.S. 690, 696 (1996) ("Articulating precisely what 'reasonable suspicion' and 'probable cause' mean is not possible. They are commonsense, nontechnical conceptions") (*quoting Illinois* v. *Gates*, 462 U.S. 213, 231 (1983)); *see also* Opinion of South Carolina Atty. Gen., 2002 WL 1340433 (May 21, 2002) ("It is our opinion that a police officer possess (sic) broad discretion under this ["must arrest"] statute" in "determining whether to arrest" because of the probable cause condition).

Elsewhere, Respondent claims that Colorado created "a protected interest in the *enforcement* of restraining orders," apparently contending that the statutory mandate at least requires *some* kind of enforcement within the panoply of options available to police. Resp. Br., at 21 (emphasis added); *compare* NBPA Br., at 8 (arguing that the statute requires "*every* reasonable means" of enforcement). Still elsewhere, Respondent contends that the "statute imposes a mandatory, affirmative duty on the part of police officers to *protect* persons who have a valid restraining order," Resp. Br. at 25 (emphasis added), thereby shifting the focus from enforcement (whether by arrest or otherwise) *after* violation to intercession *before* violation. It may certainly be possible for Colorado to create an entitlement to 24-hour-a-day protective services, which would at least bear some resemblance to the kind of interests this Court has previously recognized as property. *See* Resp. Br., at 14 (*citing, e.g.*, *Logan* v. *Zimmerman Brush Co.*, 455 U.S. 422, 428 (1982); *Memphis Light, Gas & Water Div.* v. *Craft*, 436 U.S. 1, 11-12 (1978); *Mathews* v. *Eldridge*, 424 U.S. 319 (1976); *Goldberg* v. *Kelly*, 397 U.S. 254, 262 (1970)); ACLU Br., at 10; NBPA Br., at 5. But there is nothing in the statutory scheme at issue here to suggest that Colorado sought to take that step and, outside of the decision below and the two district court

opinions on which it relied, we are unaware of *any* comparable application of *Roth*.

With so many possible permutations of just what the statute specifies that police "shall" do, it is hard to define with any specificity, much less the specificity required by *Roth*, just what the precise "specific benefit" is that Ms. Gonzales believes she has been given. *Roth*, 408 U.S., at 577. Neither the Colorado statute, nor the restraining order, mandates a particular result.

The background principles against which this statute, or any statute specifying police duties, must be read bolsters the point. In *City of Chicago* v. *Morales*, 527 U.S. 41, 47 n.2 (1999), this Court addressed a Chicago ordinance that specified that a police officer "*shall* order all [loitering gang members] to disperse and remove themselves from the area." In holding that police had an unconstitutional amount of discretion to decide whether to enforce the statute, and against whom, Justice Stevens noted: "It is possible to read the mandatory language of the ordinance to conclude that it affords the police no discretion, since it speaks with the mandatory 'shall.' However, not even the city makes this argument, which flies in the face of common sense that all police officers must use some discretion in deciding when and where to enforce city ordinances." *Id.*, at 62 n.32. As noted in our opening brief, Colorado follows the same common-sense background principle. *See, e.g.*, *People* v. *Hauseman*, 900 P.2d 74, 78 (Colo. 1995). Yet that traditional discretion undermines any claim of entitlement to a "specific benefit" here.

B. Respondent and Her *Amici* Completely Ignore This Court's Holdings in *Sandin* and *Olim*.

More fundamentally, even if the statute and restraining order combined to mandate a certain police response, Respondent and her *amici* have completely ignored this Court's decisions in *Sandin* and *Olim* v. *Wakinekona*, 461 U.S. 238

(1983), holding that procedural mandates do not create substantive entitlements. "The State may choose to require procedures for reasons other than protection against deprivation of substantive rights, of course, . . . but in making that choice the State does not create an independent substantive right." *Olim*, 461 U.S., at 251; *see also Doe by Nelson* v. *Milwaukee County*, 903 F.2d 499, 503 (CA7 1990) (describing similar "mandatory" statutory language as "a set of procedures that guides [police] in their efforts to prevent" domestic violence). In *Sandin*, this Court recognized that States "codify prison management procedures in the interest of uniform treatment," adding that "[s]uch guidelines are not set forth solely to benefit the prisoner. They also aspire to instruct subordinate employees how to exercise discretion." 515 U.S., at 482. The Court then overruled *Hewitt* v. *Helms*, 459 U.S. 460 (1983), and its methodology of finding liberty interests from mandatory language because the *Hewitt* approach created a disincentive for States to confine discretionary authority by use of such procedural mandates, lest they be found to have created a constitutionally-protected property interest in the procedures. *Id.*

Although Petitioner argued in its opening brief that *Sandin* was "all but dispositive," Respondent does not even cite, much less come to grips with, either *Sandin* or *Olim*, or with the sensible recognition that a State may "mandate" certain conduct by its employees without thereby creating a property interest.[6] Indeed, Respondent herself notes that the Legislature's purpose in enacting the statute was "to provide

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[6] Likewise, none of Respondent's *amici* address the holdings in *Sandin* and *Olim* that a State can "mandate" certain procedures for its employees without thereby creating a constitutionally-protected interest in those procedures. Only one of the nine *amici* in support of Respondent even mentions *Sandin* and only two cite *Olim*, and none of the briefs address the holdings discussed above. *See* NBPA Br., at 7, 15 n.8; FVPF Br., at 20-21.

guidance to law enforcement." Resp. Br., at 20 (emphasis added); *see also* NBPA Br., at 7; *id.*, at 27-29; Kerns Br., at 11. This is just what one would expect from a State intent on giving direction to its police offices, but completely at odds with the claim of entitlement advanced by Respondent.

C. This Court Has Declined to Recognize a Judicially Cognizable Interest in the Arrest of Another.

The Department of Justice rightly points out in its *amicus* brief that "a private citizen lacks a judicially cognizable interest in the prosecution or nonprosecution of another." DOJ Br. at 18 (quoting *Linda R.S.* v. *Richard D.*, 410 U.S. 614, 619 (1973)). Although *Linda R.S.* dealt with "prosecution," this Court applied its holding to "arrests" in *Leeke* v. *Timmerman*, 454 U.S. 83, 86 (1981). Plaintiffs in *Leeke* were state prison inmates who sued state officials for conspiring to prevent the arrest of a prison guard who had allegedly beaten the inmates unnecessarily during a prison uprising. *Leeke* involved the quintessential "special relationship" of a prison setting, yet even there this Court recognized that private citizens do not have a judicially cognizable interest in the arrest of another. *Id.*, at 87 n.2 (citing *State* v. *Addison*, 2 S.C. 356, 364 (1871), for the proposition that "[s]ave for the just and proper vindication of the law, no one has an interest in the conviction of [another]"). *See also Simon* v. *Eastern Ky. Welfare Rights Organization*, 426 U.S. 26, 37 (1976) (adhering to "the settled doctrine that the exercise of prosecutorial discretion cannot be challenged by one who is himself neither prosecuted nor threatened with prosecution").

The Second Circuit's decision in *Inmates of Attica Correctional Facility* v. *Rockefeller*, 477 F.2d 375 (CA2 1973), is particularly instructive. Plaintiffs in the case were inmates of the state prison in Attica, New York, at the time of highly publicized riots at the prison in which 32 inmates were killed as prison officials regained control of the prison. The inmates contended, not implausibly, that prior to, during, and

after the riots, some prison guards had violated their civil and constitutional rights, and they tried to have the U.S. Attorney for the region investigate and, where warranted, arrest and prosecute the guards. Despite a federal law that specifically "authorized *and required*" the U.S. Attorney "to institute prosecutions against all persons violating" the particular laws at issue, *see* 42 U.S.C. § 1987, no arrests were made and the inmates filed suit to compel the U.S. Attorney to comply with the federal mandate. The inmates pressed an argument about their standing to demand arrest of the guards very similar to the argument advanced by Respondent's *amici* here, namely, that failure to arrest would only encourage more violence against the inmates. *See Attica*, 477 F.2d, at 378; *see also* ACLU Br., at 17; NNEDV Br., at 3, 16, 25; NCADV Br., at 13; Kerns Br., at 4.[7] Nevertheless, the Second Circuit affirmed the district court's refusal to issue a mandamus compelling the U.S. Attorney "to investigate, arrest, and prosecute" the prison guards, holding that the issuance of a mandamus would contravene the "traditional judicial aversion to compelling prosecutions" and impermissibly intrude upon executive discretion, in violation of the separation of powers doctrine. *Attica*, 477 F.2d, at 379-80. The court noted that "federal courts have traditionally and, to our knowledge, uniformly refrained from overturning, at the instance of a private person, discretionary decisions of federal prosecuting authorities not to prosecute persons regarding whom a complaint of criminal conduct is made." *Id.*, at 378 (citing cases).

The Second Circuit also expressly rejected the identical argument pressed by Respondent and her *amici* here,

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[7] The further claim that the issuance of the restraining order was a "state-created danger" because it lulled Ms. Gonzales into not taking steps to protect herself, *e.g.*, ACLU Br., at 20-21, was rejected by this Court in *DeShaney*, 489 U.S., at 197-201, where the claim was much stronger than it is here, *see id.*, at 208-10 (Brennan, J., dissenting).

namely, that the federal statute's use of mandatory language withdrew normal prosecutorial discretion, holding that "[t]he mandatory nature of the word 'required' as it appears in § 1987 is insufficient to evince a broad Congressional purpose to bar the exercise of executive discretion in the prosecution of federal civil rights crimes." *Id.*, at 381. The court noted that "[s]imilar mandatory language is contained in the general direction in 28 U.S.C. § 547(1) ("each United States attorney, . . . *shall*-(1) prosecute for all offenses against the United States; . . ." (emphasis supplied)) and in other statutes in particular areas of concern, *e. g.*, 33 U.S.C. § 413 ("it shall be the duty of United States attorneys to vigorously prosecute all offenders" of certain provisions of the Rivers and Harbors Act when requested to do so by the appropriate officials)," yet it recognized that "[s]uch language has never been thought to preclude the exercise of prosecutorial discretion." *Id.*

D. Colorado's Own Actions Belie the Claim that It Intended to Create a "Drop Everything" Property Interest in Police Protection.

Even assuming that Colorado could ever create a property right to a "drop everything" enforcement, by arrest, of a restraining order, it has not done so here. Respondent's *amici* mischaracterize the order at issue here as mandating protection from a "batterer" or "abuser." *See, e.g.*, FVPF Br., at 11-12, 18. No findings of abuse were ever made, and Respondent makes no such allegation. Moreover, the crime of violating a restraining order is a relatively minor class 2 misdemeanor, and Colorado does not permit a tort remedy for non-willful and wanton police failures to enforce. Neither action is consistent with the claim of entitlement advanced by Respondent and accepted by the court below.

1. Respondent's *Amici* Mischaracterize the Restraining Order as a "Protection Order," and Rely on a Legislative Finding Made Five Years *After* the Events at Issue Here.

A number of Respondent's *amici* erroneously describe the order at issue in this case as a "protection order" rather than a "restraining order," apparently trying to bolster the argument that Ms. Gonzales had an entitlement to police *protection* rather than to an injunction restraining Mr. Gonzales. *See, e.g.*, NNEDV Br., at 22-25; NCADV Br., at 5; Kerns Br., at 10, 16-17; Brief of *amicus curiae* AARP, at 7-8. Several of the *amici* also contend that the Colorado legislature has made enforcement of protection orders—impliedly such as that issued to Ms. Gonzales—a "high priority" "of paramount importance." *See, e.g.*, Kerns Br., at 3, 11-12. Those arguments are based on amendments to the Colorado statutory scheme made *after* the events at issue in this case, and on findings of domestic abuse that were not made or even alleged here.

Colorado law at the time of the events giving rise to this litigation actually provided for several kinds of restraining orders. One statute authorized the issuance of restraining orders incident to a dissolution of marriage, preventing a party to the dissolution from concealing or disposing of marital property or from "molesting or disturbing the peace of spouse and children." C.R.S. § 14-10-108(a), (b) (1999) (the "Dissolution Orders Statute"). No finding of past, present, or future dangerousness was required for an order to be issued under either of these provisions.[8]

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[8] The statute also authorizes exclusion from the family home based upon a finding that either physical or emotional harm would otherwise result. C.R.S. § 14-10-108(c); PA 89a. Respondent's selective quotation of the statute, at page 20, erroneously conveys the impression that the "physical or emotional harm" showing required for an exclusion-from-the-family-home order also applies to the injunction against molesting and disturbing the peace. It does not.

A separate Colorado statute authorized the issuance of "restraining orders to prevent domestic abuse" by a person who "has committed acts constituting domestic abuse." C.R.S. § 14-4-102 (*repealed* July 1, 1999) (the "Domestic Abuse Statute").[9] Additionally, C.R.S. § 14-10-108(2.5) (the "Child Custody Provision"), added to the Dissolution Orders Statute in 1994 (and subsequently repealed in 2004), authorized the award of interim legal custody of a child when "reasonably related to preventing domestic abuse . . . or preventing the child from witnessing domestic abuse."

Significantly, the orders at issue in this case were issued pursuant to the Dissolution Orders Statute, not the Domestic Abuse Statute or the Child Custody Provision. *See* PA 89a. Neither the temporary order issued on May 21, 1999, nor the permanent order issued June 4, 1999, was based on a finding of "domestic abuse," as would have been required for a restraining order under the Domestic Abuse Statute, and the Child Custody Provision of the pre-printed injunction that was issued to Mr. Gonzales is lined through and thereby made inapplicable. *Id.*[10] Rather, Mr. Gonzales was enjoined from disposing of his property and from molesting or disturbing the peace of Ms. Gonzales and their children, as

[9] C.R.S. § 14-4-102 was replaced by C.R.S. § 13-14-102, upon which several of Respondent's *amici* rely. The new statute permits an *ex parte* "temporary civil restraining order" upon the finding that an "*imminent danger*" exists to the person seeking protection, and a permanent order if "the judge or magistrate is of the opinion that the defendant has committed acts constituting grounds for issuance of a civil protection order and that unless restrained will continue to commit such acts . . . ." C.R.S. §§ 13-14-102(1)(b), (4), (9)(a) (effective July 1, 1999) (emphasis added). No such findings were made or alleged here.

[10] The pre-printed order does announce a general finding of "irreparable injury" if the order was not issued, but that finding applied as much to the ban on property transfers as to the no-molest provision. There was no finding of domestic abuse. PA 89a.

permitted by the Dissolution Orders Statute. PA 89a.[11] He was not barred from having contact with the children, as might have been required had there been a finding of "domestic abuse" (if parenting time would have been allowed at all). Instead, he was specifically granted unsupervised parenting time.[12]

In other words, Respondent's *amici* aim their argument at the wrong statutory provision, based on findings of domestic abuse that were never made or alleged. *See, e.g.*, Kerns Br., at 16 (citing the wrong statute and erroneously claiming that a court already made "two essential findings" of prior violence and likelihood of future violence); ACLU Br., at 3 (claiming, without citation, that Mr. Gonzales "had a history of abusive and erratic behavior"); FVPF Br., at 18 (without citation, describing Mr. Gonzales as an "abuser"). Colorado did not adopt the terminology of "protection order" until 2003, and did not codify its view that issuance and enforcement of such orders were of "paramount importance" to the public policy of the State until July 1, 2004—four and five

[11] Although Mr. Gonzales was also barred from the family home, his substantial and unsupervised parenting rights make clear that the finding of "either physical or emotional harm" required for that part of the order addresses his interaction with Ms. Gonzales, not any concern about violence toward the children. PA 5a. In any event, because there is no allegation that Mr. Gonzales entered the family home, that part of the injunction is not at issue here.

[12] Respondent erroneously claims that the restraining order at issue here limited Mr. Gonzales's ability to have "contact" with Ms. Gonzales and their daughters. Resp. Br., at 5. Mr. Gonzales was excluded from the family home, and barred from "molesting" or "disturbing the peace" of Ms. Gonzales and their daughters, but he was not barred from having contact with the girls. Indeed, as Respondent later recognized, he was explicitly authorized to have unsupervised parenting time with his daughters every other weekend, for two weeks every summer, and—subject to the modest requirement that he notify Mrs. Gonzales first—for a midweek dinner visit—the very time when the killings took place. *See* Resp. Br., at 30; PA 5a.

years, respectively, after the events at issue here. *See* C.R.S. 13-14-101(2.4), *added by* 2003 Colo. Laws, Ch. 139, § 1 (H.B. 03-1117) (effective July 1, 2003); C.R.S. 13-14-102(1), added by Colo. Laws 2004, Ch. 178, § 2 (effective July 1, 2004).

Even if the statutory amendment adding the Legislature's view that the issuance and enforcement of protection orders are of "paramount importance" was just a "clarifying amendment," as some of Respondent's *amici* claim, NNEDV Br., at 7 n.5, the State clearly did not intend thereby to supplant its entire crimes classification scheme, elevating this relatively minor class 2 misdemeanor above felonies, for example. *See* Part II.D.2, *infra*. Nor does the amendment indicate, much less dispositively prove, that the State intended to create a property interest. Perhaps a statute specifically promising "protection" from the State (together with an order based on specific findings of prior acts of violence and likely future acts of violence), which expressly states it is creating an entitlement to such protection in its beneficiaries and which provides to those beneficiaries a remedy against the government or its officers for failures to protect, rather than an order simply "restraining" a private party, may one day be held to create a property interest, to which some procedural due process would attach. *See, e.g., Attica*, 477 F.2d, at 381 (suggesting that such a statute might create an entitlement); *consider* 42 U.S.C. § 1990 ("Every marshall . . . shall obey and execute all warrants and other process, when directed to him . . . [and if he] refuses or neglects to use all proper means diligently to execute the same, shall be liable to a fine . . . of $1,000, *for the benefit of the party aggrieved thereby*") (emphasis added). But that hypothetical statute, and the legislative determination that protection statutes are of "paramount importance," are not at issue here; the arguments grounded on them are therefore simply misplaced.

2. Colorado Classifies the Crime of Violating a Restraining Order as a Relatively Minor Class 2 Misdemeanor, and Bars Tort Remedies for Non-Willful and Wanton Conduct.

Respondent concedes that, "[f]or purposes of a § 1983 action, whether a property interest exists is dependent on state law." Resp. Br., at 18 (quoting *Bishop* v. *Wood*, 426 U.S. 341, 344 (1976)).[13] Perhaps the best evidence that Colorado did not intend to create a property interest in "drop everything" enforcement of restraining orders or in protection incident to them is the relatively minor sanction the Colorado law imposes on restraining order violations.

Colorado law provides that the crime of violating a restraining order is a Class 2 misdemeanor. There are eleven classes of crimes in Colorado—six classes of felonies, three classes of misdemeanor, and two classes of petty offenses.

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[13] For this reason, the contention by Respondent's *amici* that there is an "evolved customary norm of international law that recognizes the right to protection from and compensation for domestic violence," is unavailing. Brief of *amici curiae* Internat'l Law Scholars, *et al.* ("ILS Br."), at 6. Because property interests are defined by state law rather than even by the federal Constitution, it seems implausible that they can be created, for purposes of U.S. constitutional law, by evolved international norms, particularly when such norms are derived from interpretations of treaties not ratified by the United States or where the United States has expressly disclaimed private causes of action. *See, e.g.*, ILS Br., at 11 n.14 (U.S. has not ratified CEDAW); *id.*, at 24 (Senate declaration that ICCPR is not self-executing). Moreover, even if such norms could create a protectable property interest, they have not done so. *See, e.g., id.*, at 10 (conceding that protection from domestic violence is not explicit in the ICCPR). In any event, the international law claim pressed by Respondent's *amici* is a new issue, not within the scope of the questions presented or addressed by the court below. It is therefore not properly before this Court. *See, e.g., Matsushita Elec. Industrial Co.* v. *Zenith Radio Co.*, 475 U.S. 574, 579 n.3 (1986); *Youakim* v. *Miller*, 425 U.S. 231, 234 (1976); *see also Kamen* v. *Kemper Fin. Servs., Inc.*, 500 U.S. 90, 97 n.4 (1991) (this Court "do[es] not ordinarily address issues raised only by *amici*").

C.R.S. § 18-1-104(2). Class 2 misdemeanors—eighth out of eleven in degree of seriousness—are punishable only by 3-12 months in jail (not even in state prison), a fine of $250-1,000, or both. Comparable Class 2 misdemeanors include circulating a false statement designed to affect an election, C.R.S. § 1-13-109; failing to keep required records relating to charitable fundraising, C.R.S. § 6-16-111(1)(e); practicing barbering or cosmetology without a license, C.R.S. § 12-8-127; boxing without a license, C.R.S. § 12-10-110; and conducting a bingo game without a bingo-raffle license, C.R.S. § 12-9-114. Voting in the wrong precinct is a more serious Class 1 misdemeanor, punishable by up to $5,000 fine, 18 months in jail, or both. C.R.S. § 1-13-709. Class 1 misdemeanors also include third degree assault on a peace officer, C.R.S. § 18-1.3-501; unregistered telemarketing, C.R.S. § 6-1-305; and selling a motor vehicle without a license, C.R.S. § 12-6-121. Voting by knowingly giving a wrong residential address is a Class 5 felony, C.R.S. § 1-2-225, punishable by 1-3 years in prison, a fine of $1,000 to $100,000, or both. C.R.S. § 18-1.3-401. Sexual assault, including statutory rape, is a Class 1 misdemeanor (for consensual conduct with a 15-17 year old) or a Class 2-4 felony, depending on the circumstances. C.R.S. § 18-3-402. Yet Respondent asserts that Colorado made a deliberate policy choice to create a property interest in enforcement of this one particular Class 2 misdemeanor, mandating action by police that is not mandated by *any* of the more serious statutory crimes. It is hard to imagine that Colorado intended to create a property interest in mandatory enforcement for such violations of a marriage dissolution order as encumbering marital property without permission, treating such enforcement as of "paramount importance" even above enforcement of sexual assault crimes. *See* NBPA Br., at 5a (reprinting IACP Model Policy "that domestic violence be treated with *the same* consideration as violence in other enforcement contexts").

Colorado's Governmental Immunity Act also confirms that a property interest was not envisioned.[14] Government employees are expressly immune from liability for any injury claim "which lies in tort or could lie in tort regardless of whether that may be the type of action or the form of relief chosen by a claimant . . . unless the act or omission causing such injury was willful and wanton . . . ." C.R.S. § 24-10-118(2)(a). And the government entities themselves are absolutely immune from suit unless and to the extent that there is a waiver, not applicable here, at C.R.S. § 24-10-106(1).

Respondent's own *amici* recognize this Court's oft-stated rule that "the Due Process Clause should not be so stretched that it becomes 'a font of tort law to be superimposed upon whatever systems may already be administered by the States." NAWL Br., at 19 (quoting *Daniels* v. *Williams*, 474 U.S. 527, 332 (1986); *Paul* v. *Davis*, 424 U.S. 693, 701 (1976)); *see also Attica*, 477 F.2d, at 382 (declining to read mandatory arrest language as compulsory in the absence of a statutory deterrent). Yet that is precisely the result that would obtain here if Respondent's claim of property right were recognized, rending the express limitations in Colorado's tort scheme meaningless. As Respondent's *amici* concede, Colorado tort law "requires a heightened showing of intent," as well as "causation" and "reasonabl[e] foresee[ability]." NAWL Br., at 11-12 (citing, *e.g.*, *Ruegsegger* v. *Jefferson Cty. Bd. of Cty. Comm'rs*, 197 F.Supp.2d 1247, 1265 (D. Colo. 2001); *Smith* v. *State Comp. Ins. Fund*, 749

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[14] Colorado's statutory immunity for good faith false arrests, C.R.S. § 18-6-803.5(5), does not alter this conclusion. Colorado cannot waive constitutional liability, of course. *See, e.g.*, *Sibron* v. *New York*, 392 U.S. 40, 61 (1968) ("[A State] may not . . . authorize police conduct which trenches upon Fourth Amendment rights"); *see also* C.R.S. § 18-6-803(d) ("The arrest and detention of a restrained person is governed by applicable constitutional . . . rules of criminal procedure"). Nor does the immunity compel the conclusion that the Colorado Legislature intended a property interest rather than mere law enforcement guidance.

P.2d 462, 464 (Colo. App. 1987)). "The number of causal steps separating the initial wrongful act (police inaction) from its ultimate effect (domestic violence by another wrongful actor) raises doubts as to whether the injury at issue could reasonably have been foreseen." NAWL Br., at 12. Although Respondent and her *amici* are of the view that "treating failure to enforce restraining orders as a problem of constitutional dimensions [would send] a strong and necessary message," *id.*, at 10, Colorado chose instead to place increased emphasis on domestic violence and other kinds of restraining orders by establishing model enforcement procedures for its police officers, without subjecting them to tort (and potentially constitutional) liability for failure to adhere to those procedures. Colorado's decision *not* to provide the holder of a restraining order with a tort remedy after an erroneous (though non-willful and wanton) decision by police, is inconsistent with the idea that it was creating a property interest subject to the Constitution's procedural guarantees.

CONCLUSION

For the reasons stated above and previously, the decision of the Tenth Circuit should be reversed, and the decision of the District Court granting Defendants' Motion to Dismiss should be reinstated.

Respectfully submitted,

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